Supreme Court, U.S.
FILED
OCT 25 1993
OFFICE OF THE CLERK

No. 93-509

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NICK MARINO,
Petitioner,
v.
WRITERS GUILD OF AMERICA, WEST, INC., FRANCIS FORD COPPOLA, and MARIO PUZO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Respondents disagree with the Questions Presented in the petition for certiorari, as being argumentative. Instead, respondents submit that the Questions Presented should be stated as follows:

1. Did the Ninth Circuit correctly hold that petitioner Nick Marino (Marino) waived his objections to alleged defects in the arbitration procedure, by failing to raise those objections before the arbitration?

2. Did respondent Writers Guild of America, west, Inc. (Guild) breach its duty of fair representation in *negotiating* the screen credits determination system under which Marino's contribution to a motion picture was evaluated, and was the claim of breach made within the applicable limitations period?

3. Did the Guild breach its duty of fair representation in *administering* the screen credits determination system in this case?

4. Does the Guild's screen credits determination system, in which the substantive decision of screen credit is determined by a panel of the writers' peers who are guaranteed anonymity from the participants and the public, comport with the fundamental fairness required of arbitration proceedings under a collective bargaining agreement, pursuant to 29 U.S.C. §§ 173(d) and 185(a)?

CORPORATE DISCLOSURE STATEMENT (RULE 29.1)

Respondent Guild is a California non-profit corporation. There are no parent companies or subsidiaries of the Guild that have issued shares to the public. The Guild is affiliated with Writers Guild of America, East, Inc.; Writers Guild of Canada; Australian Writers Guild; New Zealand Writers' Guild, Inc.; Societe des Auteurs, Recherchistes, Documentalistes et Compositeurs; and Writers' Guild of Great Britain.

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OPPOSITION TO PETITION FOR CERTIORARI

STATUTES INVOLVED

Labor Management Relations Act (LMRA) § 203(d), 29 U.S.C. § 173(d) provides in relevant part:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

LMRA § 301(a), 29 U.S.C. § 185(a), provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United

States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

Petitioner Marino challenges the screen credits determination system negotiated and administered by respondent Writers Guild of America, west, Inc. (Guild) to determine which writer or writers participating in the development of a motion picture were to receive screen credit.

This system was originally developed over 50 years ago when the Guild first negotiated with the producers the right to conduct screen credits determinations. Previously, the producers had unilaterally determined screen credits. That 1940 collective bargaining agreement, as well as the succeeding ones, including the 1985 Minimum Basic Agreement (MBA) applicable to these proceedings, each ceded to the Guild the right to conduct screen credits determinations, subject to certain limitations. The MBA adopts by reference the Guild's procedures and provides that the results are binding on the producers and writers involved. These procedures are contained in the Guild's Screen Credits Manual, which is adopted and amended through the internal democratic procedures of the Guild.

Marino's main attack is against the central feature of these procedures—the anonymity of the writers who are chosen to decide the question of screen authorship. The writers who comprise the Guild decided that these disputes over credits should be determined by their peers—fellow writers. To avoid influence from participants, the identity of the arbiters is not revealed. Instead, the names of all eligible arbiters are contained on a list given to the participants to a dispute, and each participant is allowed to strike a reasonable number of names from the list. A representative of the Guild then selects the arbitral panel

from the remaining names, after questioning each potential arbiter on possible bias.

The petition's Statement of the Case contains numerous misstatements regarding these procedures and their application to Marino. Several of these misstatements arise from the fact that the procedure is divided into three parts: (1) a pre-arbitration hearing in which factual issues are resolved after a hearing which each party may attend and which decides which written materials are to be submitted to the arbiters; (2) the substantive decision by a panel of three arbiter/writers who deliberate on the undisputed written materials submitted to them; and (3) a Policy Review Board which reviews any claimed procedural violations, including claims of undue influence on, or dereliction of duty by the arbiters. This is described in more detail in the decision of the Ninth Circuit, reprinted as Appendix A to the Petition for Writ of Certiorari at A-3 to A-4.

Marino cites the lack of procedural safeguards, such as a hearing on the merits. These safeguards in fact exist, but they have been divided among the three parts of the procedure. For example, a full hearing may be held in the pre-arbitration phase, at which any relevant factual disputes are resolved. The facts and materials as established at that hearing or by agreement among the participants are then submitted to the panel of arbiter/writers in the second phase, who review the written material in private, away from both the participants and each other.

Several of the alleged deficiencies referred to by Marino were actually procedural issues decided by the Policy Review Board on appeal. The allegation that the parties are precluded from submitting relevant evidence refers to the decision by the Guild, upheld by the Policy Review Board, to exclude a writing by Marino which was not written under the MBA; therefore, not within the Guild's jurisdiction. The alleged failure to keep the identity of the competing writers anonymous was another issue

raised before the Policy Review Board, which investigated the claim and determined that although Marino had a right to request anonymity, he had not done so. The allegation that the Policy Review Board failed to order a new arbitration after finding that one arbiter (not two, as Marino claims) did not read all the material submitted, is incorrect. The Policy Review Board in fact remanded the materials to that arbiter for a complete reading and a redetermination.

Marino also states that evidence was received ex parte. This refers to the consideration by the arbiters of a book and two previous motion pictures in the series, all of which was, as found by the Ninth Circuit, "source material" under the Screen Credits Manual, which the Manual authorizes the arbiters to consider.

After the screen credits determination was decided against Marino, he filed this action in state court to vacate the award. The action was removed to the district court based on jurisdiction under LMRA § 301(a), 29 U.S.C. § 185(a). The district court ruled against Marino in cross-motions for summary judgment, and that judgment was affirmed by the Ninth Circuit. This petition followed the denial of Marino's petition for rehearing to the Ninth Circuit.

SUMMARY OF ARGUMENT

This is an action to vacate an arbitration award under a collective bargaining agreement governed by LMRA § 301(a), 29 U.S.C. § 185(a). There is no conflict among the circuits or with any decision of this Court in the issues decided below. The Ninth Circuit and the district court applied established legal standards to a factually unique situation. The arbitration system here was designed to deal only with a specific type dispute—screen credits—under one collective bargaining agreement. The courts below wisely left the determination of screen credits to the writers themselves.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

This is a suit to vacate a labor arbitration award. Marino was dissatisfied at losing his bid for screen credit, and in an attempt to overcome the traditional judicial deference to arbitration awards under LMRA § 301(a), 29 U.S.C. § 185(a),[1] he launched a full-scale attack on the entire procedure. The district court upheld these procedures as fundamentally fair and found no reason to vacate the award. The Ninth Circuit concluded that Marino had waived any objections to the procedure by failing to raise them until after he lost the arbitration. In the only other reported decision to review the screen credits determination procedure, a California Court of Appeal similarly held that it is entitled to deference, including the provision for anonymity of the arbiters. *See Ferguson v. Writers Guild of America, West, Inc.*, 226 Cal. App.3d 1382, 277 Cal. Rptr. 450 (1991).

What Marino is really asking is for a court to substitute its judgment for that of the writers in determining how screen credits are to be decided. The California Court of Appeal wisely declined the same invitation:

> "As judges we are no doubt as capable as any lay person of studying screenplays, outlines, and other literary material to assess the relative contributions of

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[1] *See United Steelworkers v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 596-99, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). The Federal Arbitration Act, 9 U.S.C. § 10, cited by Marino as the statute involved, "does not apply to 'contracts of employment of . . . workers engaged in foreign or interstate commerce,' 9 U.S.C. § 1, but the federal courts have often looked to the Act for guidance in labor arbitration cases . . . ." *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). Therefore, it is not the "statute involved," but may be referred to in fashioning the federal common law under LMRA § 301(a). *Id.*

> the participating writers. The membership of the Writers Guild, however, have agreed among themselves (by approving the [Screen] Credits Manual) and with the producers' association (by entering into [the MBA]) that this delicate task is to be performed by arbitration committees composed of experienced Writers Guild members. The professional writers who constitute the Writers Guild have thus decided—quite appropriately, we think—that the credit-determination process can be handled both more skillfully, more expeditiously, and more economically by Writers Guild arbitration committees than by courts." *Ferguson, supra*, 226 Cal. App.3d at 389, 277 Cal. Rptr. at 454.

II. THERE ARE NO CONFLICTING DECISIONS AMONG THE CIRCUITS

Marino cites no conflicting authority among the circuits on any legal issue involved in this case. In the only other published opinion to consider the screen credits determination of the Guild, *Ferguson v. Writers Guild of America, west, Inc.*, 226 Cal. App.3d 1382, 277 Cal. Rptr. 450 (1991), the Guild procedure was also upheld. 226 Cal. App.3d at 1389-91, 277 Cal. Rptr. at 454-55.

Marino claims that the Ninth Circuit's holding that Marino waived his claims to the anonymity of the writers, is inconsistent with decisions stating that a party does not waive an objection where the objection is futile. But the Ninth Circuit also said that "we do *not* hold that every possible endemic procedural defect must be raised in advance or waived." Petition for Writ of Certiorari at A-13 (emphasis added). Instead, it looked at Marino's objection as a challenge to the impartiality of the arbiters, which he had an opportunity to raise early in the proceedings. In fact, Marino struck 85 names from the list furnished to him by the Guild and returned the list without comment, implying that he had no objection to the remaining names. Petition for Writ of Certiorari at A-10.

Among the circuits there is no dispute that a claim of arbitral bias is waived if it is not raised before the arbitrator is seated. *See Carr v. Pacific Maritime Ass'n*, 904 F.2d 1313, 1317 (9th Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358-59 (6th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 732 (5th Cir. 1987); *Early v. Eastern Transfer*, 699 F.2d 552, 558 (1st Cir.), *cert. denied*, 464 U.S. 824 (1983); *United Steelworkers Local 1913 v. Union Railroad Co.*, 648 F.2d 905, 913 (3d Cir. 1981); *In re Cook Industries, Inc. and C. Itoh & Co.*, 449 F.2d 106, 107-08 (2d Cir. 1971), *cert. denied*, 405 U.S. 921 (1972).

The unanimity of the circuits leaves no room to argue that clarification is required by this Court.

III. THIS CASE IS FACTUALLY UNIQUE AND A DECISION BY THIS COURT WOULD HAVE NO GENERAL APPLICABILITY

The screen credits determination procedure is a specialized procedure designed to deal with one particular kind of dispute in one particular collective bargaining agreement.[2] This is not a run-of-the-mill arbitration over discipline or seniority. It is designed only to deal with the difficult issue of authorship of a screenplay, an issue which does not arise in any other collective bargaining agreement of which we are aware. It is the unique nature of this type of dispute which calls for such unique procedures. Because of this singularity, the issues raised by these procedures are of little interest and less relevance to parties to any other collective bargaining agreement.

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[2] The MBA also contains a more traditional grievance/arbitration procedure for other contract disputes.

IV. THERE ARE NO IMPORTANT ISSUES OF LAW OR POLICY WHICH WOULD BE DECIDED IN THIS CASE

There is no issue which could be raised in this case which will have a significant impact on either the state of the law or any parties outside of those immediately concerned with the dispute. The issue of waiver decided by the Ninth Circuit is based on a finding of the particular facts of this case in which Marino did not object to the arbiters or the procedure for selecting them until after they had ruled against him.

Nothing the Court does here will, as Marino argues, Petition for Writ of Certiorari at 13, encourage potential litigants to employ a process which is already established as the norm in collective bargaining contracts. *See United Steelworkers v. Warrior Gulf & Navigation Co.*, 363 U.S. 574, 578, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). Instead, the question is whether the courts will substitute their own judgment for that of the parties who agreed to this procedure, a proposition that this Court has laid to rest. *See, e.g., Air Line Pilots Association v. O'Neill*, 499 U.S. 65, 111 S.Ct. 1127, 1135, 113 L.Ed.2d 51 (1991) ("Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union"); *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 39, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987) ("The parties bargained for arbitration to settle disputes and were free to set the procedural rules for arbitrators to follow if they chose").

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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